BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

This is an action at law within the meaning of the Seventh Amendment to the United States Constitution under which your petitioner is entitled to a trial by jury.

It is the respondent's thesis that this right is purely procedural (Section 11 of the Condemnation Law of New York), and your petitioner contends that this right is substantive; guaranteed to her by the Seventh Amendment to the Federal Constitution and by Title 28, Section 770, U. S. C.

In *Kohl* v. *U. S.*, 91 U. S. 367 (1875), the Secretary of the Treasury condemned a site for a courthouse and the question of damages was referred to a jury. Upon review, this Court, in upholding the condemnee's right to a jury trial, stated:

> "If, then, a proceeding to take land for public uses by condemnation may be a suit at common law, jurisdiction of it is vested in the Circuit Court. That it is a 'suit' admits of no question. * * * 'The term (suit) is certainly a very comprehensive one, and it is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit'." (Page 452, Lawyer's ed.)

Cf. *Miss. etc.* v. *Patterson*, 98 U. S. 403 (1878); *Madisonville Traction Co.* v. *St. Bernard Mining Co.*, 196 U. S. 239; *United States* v. *Jones*, 109 U. S. 513 (1883); *Chappel* v. *United States*, 160 U. S. 499 (1896).

The Circuit Court erroneously concluded that a jury trial would have been futile, because the Court had no right to inquire as to the public use. This was erroneous because the jury right is not confined to the preliminary trial. It extends to all issues including the damage. By its determination the Circuit Court has not only deprived petitioner of a hearing on the issues of public use but also inferentially foreclosed your petitioner from a jury assessment of the damage. This Court will recognize that a deprivation of the right to trial by jury is substantial and not merely "harmless" (198).

POINT II

The respondent has no power to condemn land to be used by a private aviation company as a private enterprise in the production of military equipment.

The act of July 2, 1940, c. 508, 54 Stat. 712, passed "to expedite the strengthening of national defense", provides that the Secretary of War may authorize the necessary construction of plants, buildings, facilities, including government owned facilities at privately owned plants, the expansion of such plants, the acquisition of such land and the purchase and lease of such structures as may be necessary for the development of military facilities. There is no evidence in the record showing the existence of any Government owned facility at the plant of the Republic Aviation Corporation.

The respondent urges that it may condemn land to be used by a private aviation company, for the sole benefit, profit and use thereof, in the production of military equipment. The act of July 2, 1940, adverted to, does not support that construction.

A distinction must be observed between the acquisition of the instant property in time of peace (December 19, 1940) and the acquisition of property under specific war

powers. While the term "declare war" connotes authority co-extensive with its requirements (*U. S.* v. *MacIntosh*, 283 U. S. 605, 622, 1931) the existence of such a state does not suspend the guaranties of the Fifth and Sixth Amendments (*U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81, 1921).

The power of the United States to create corporations as instrumentalities for war purposes was recently upheld in cases involving the manufacture of aircraft (*Clamman County* v *U. S.*, 263 U. S. 341, 1923), merchant vessels (*Sloan's Shipyards* v. *U. S. Fleet Corp.*, 258 U. S. 549, 1922), and the construction of the Wilson Dam under authority of the National Defense Act of 1916 (39 Stat. 166, *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326, 1936), but it is well settled that the right to condemn, as an incident of sovereignty, is limited by the requirements that land be taken for a public use upon making just compensation.

The extent to which property may be taken rests wholly in the legislative discretion. (*Searl* v. *School District No. 2*, 133 U. S. 553, 562 (1890); *Shoemaker* v. *United States*, 147 U. S. 298 (1893).)

> "The necessity that the use shall be public excludes the idea that property may be taken under semblance of public use and ultimately conveyed and appropriated to a private use" (20 C. J. 548).

See also: *Noble* v. *Haskell*, 219 U. S. 104; *Bacon* v. *Walker*, 204 U. S. 311; *Offield* v. *New York*, 203 U. S. 372; *Strickley* v. *Highland*, 200 U. S. 527; *Clark* v. *Nash*, 198 U. S. 361; *Head* v. *Amoskeag*, 113 U. S. 9.

> "But whether the use for which private property is taken is a public use is ultimately a question for the Courts" (20 C. J. 549).

See also: *Sears* v. *Akron*, 38 S. Ct. 245; *Shoemaker* v. *U. S.*, 147 U. S. 282; *In re New York*, 190 N. Y. 350; *In re Burns*, 155 N. Y. 23.

When the United States needs lands the Congress may authorize such lands to be taken either by proceedings in the Courts of the States or in its own Courts, in accordance with its legislative mandate.

(*Chappel* v. *United States*, 160 U. S. 499, 510 (1896); *Harris* v. *Elliott*, 10 Pet. 25 (1836); *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641 (1890); *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312 (1893); *Luxton* v. *North River Bridge Co.*, 153 U. S. 525 (1894); *Mfrs. Land, etc. Co.* v. *United States Shipping Board, etc.*, 264 U. S. 250 (1924); *James* v. *Dravo Cont. Corp.*, 302 U. S. 134 (1937).)

But assertion by Congress that the use is public would not make it so unless in fact public. "Public use" means use by the public. This term is not synonymous with public interest or benefit. It means more than mere public convenience. The test is: does the "general public have the right to a definite and fixed use of the property appropriated, not as a mere matter of favor or permission of the owner, but as a matter of right * * *" (20 C. J. 555). Congress, incidentally, has not said that the contemplated use in this case is public. It has provided for Government owned facilities at privately owned plants, and no more.

It is undeniably true that if in the execution of a public purpose a sovereign acquired land in excess of its needs it may later sell it at private sale. This would not render the original taking invalid. But a privately owned aviation plant is not a public utility catering with permanence and continuity to a general public need.

In *Missouri P. R. Co.* v. *Nebraska ex rel. Board of Transportation* (164 U. S. 403) the State took property, without the owner's consent, for the private use of another. This was held unconstitutional.

Granted that the Government will derive benefit from the extension of plant facilities at Republic Aviation Cor-

poration, where is the line to be drawn, short of honestly named acquisition by sovereign right for private use.

The Government's theoretical right to acquire the plant or any part of it does not transform it into a public use (*Dodge* v. *Mission*, 107 Fed. 827, 833).

A "* * * taking of property for private use cannot be authorized by Congress without violating the Fifth Amendment to the Constitution of the United States * * *" 10 R. C. L. Sec. 25 P. 28.

Barron v. *Baltimore*, 7 Pet. 243, 8 U. S. (L. ed.) 672;

Withers v. *Buckley*, 20 How. 84, 15 U. S. (L. ed.) 816;

Clark v. *Nash*, 198 U. S. 361;

Hairston v. *Danville, etc. Railroad Co.*, 258 U. S. 298.

POINT III

The Court erred in denying to the petitioner a bill containing particulars of the allegations found in the petition.

In *Kohl* v. *United States*, 91 U. S. 367, 376, *Upshur County* v. *Rich*, 135 U. S. 467, 476, and *Chappel* v. *United States*, 160 U. S. 499, 513, 514, it was held that a condemnation case was in substance an action at law.

The Circuit Court erred in deciding that the decision of the Secretary of War was not open to judicial inquiry. The point advanced by your petitioner was that the particulars sought related to the question of public use and not necessity. The error appears to rest in the Circuit Court's failure to distinguish these propositions.

The respondent avers that the taking was for a public use (27). This is denied (41), thereby creating an issue of fact as to public use. It is elementary that in such circumstances your petitioner is entitled to a bill of particulars to avert surprise at a hearing and to enable her to meet the issue that the particular condemnation is not for a public use; a defense which is perfectly valid as a matter of substantive law. (*People ex rel. Horton* v. *Prendergast*, 248 N. Y. 215; *Shoemaker* v. *U. S.*, 147 U. S. 282; *Erie Railroad Co.* v. *Steward*, 170 N. Y. 172, 178; *Ackerman* v. *True*, 175 N. Y. 353, 365; *Matter of Burns*, 155 N. Y. 23, 27; *Matter of Mayor, etc. of City of New York*, 135 N. Y. 253, 259.)

CONCLUSION

The Writ of Certiorari should be granted.

Dated: New York, December 1, 1942.

E. JOHN ERNST, JR.,
Counsel for Petitioner.

INDEX

CITATIONS

503493—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 572

JUSTINE L. LAMBERT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The several opinions of the district court (R. 51–54, 64–66, 102–115 and 175–178) are reported in 41 F. Supp. 469, 41 F. Supp. 805, 43 F. Supp. 561, and 43 F. Supp. 805, *sub nom. United States* v. *243.22 Acres of Land.* The opinion of the circuit court of appeals (R. 186–196) is reported in 129 F. (2d) 678, *sub nom. United States* v. *243.22 Acres of Land.*

JURISDICTION

The judgment sought to be reviewed was entered on July 13, 1942 (R. 197). The petition for a writ of certiorari was filed December 7, 1942, within the time as extended by a Justice of this Court (R.

198). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a judgment of condemnation entered prior to the determination of just compensation is final and appealable.

2. Whether the Constitution empowers the United States to condemn land for use by a private aviation company in the production of military aircraft.

3. Whether the Seventh Amendment requires a jury trial in condemnation proceedings brought by the United States.

STATUTE INVOLVED

Section 1 of the Act of July 2, 1940, c. 508, 54 Stat. 712, provides in part as follows:

> (a) in order to expedite the building up of the national defense, the Secretary of War is authorized, out of the moneys appropriated for the War Department for national-defense purposes for the fiscal year ending June 30, 1941, with or without advertising, (1) to provide for the necessary construction, rehabilitation, conversion, and installation at military posts, depots, stations, or other localities, of plants, buildings, facilities, utilities, and appurtenances thereto (including Government-owned facilities at privately owned plants and the expansion of such plants, and the acquisition of such land, and the purchase or lease

of such structures, as may be necessary), for the development, manufacture, maintenance, and storage of military equipment, munitions, and supplies, and for shelter; (2) to provide for the development, purchase, manufacture, shipment, maintenance, and storage of military equipment, munitions, and supplies, and for shelter, at such places and under such conditions as he may deem necessary; * * *.

(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, and, when he deems it necessary in the interest of the national defense, to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

STATEMENT

The judgment sought to be reviewed affirmed a judgment of condemnation which sustained the authority of the United States to condemn petitioner's land and reserved jurisdiction to determine the amount of just compensation (R. 123–

130). The material facts may be summarized as follows:

On December 17, 1940, the Secretary of War requested the institution of proceedings to condemn petitioner's land, stating that such acquisition was necessary for military purposes under the Act of July 2, 1940, c. 508, 54 Stat. 712 (R. 15–16). The Government filed its petition to acquire the lands on December 19, 1940, attaching the Secretary's letter to the petition as Exhibit A (R. 9–16). At the same time a declaration of taking was filed pursuant to the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a, and estimated compensation of $111,809.40 was deposited in court (R. 4–7). An order was entered the following day, declaring that fee simple title had vested in the United States and the right to just compensation had vested in the persons entitled thereto, and directing immediate delivery of possession to the Government (R. 18–21).

Petitioner, by answer filed September 11, 1941, asked dismissal of the proceeding on the ground that the land, instead of being taken for public use, was being taken for the private use of the Republic Aviation Corporation, alleging that the Government had leased the land to that company for five years with an option to purchase at the expiration of the lease (R. 22–23). An amended petition was filed on September 12, 1941, alleging the claims of ownership with greater particularity (R. 27–38), and Mrs. Lambert an-

swered this petition three days later, repeating the purported defenses of her original answer (R. 41–44).

Thereafter, petitioner moved for a bill of particulars (R. 45–46). The district court, in an opinion of October 16, 1941, held that it had discretion to grant such a motion, but that the items sought were either sufficiently stated in the petition or were irrelevant to any triable issue (R. 51–54). An order denying the motion was entered November 3, 1941 (R. 49–50). Petitioner also made demand for a jury trial on the issues raised by its answer (R. 57). The court held that in a federal condemnation proceeding there is no right to a trial by jury (R. 64–66) and, by order of November 8, 1941 (R. 62–63), granted a motion of the Government to strike petitioner's demand.

Trial upon issues other than compensation was had by the court on November 10, 1941. The Government's evidence consisted of the letter of the Secretary of War, requesting institution of this proceeding, and the declaration of taking signed by him (R. 69–70). Mrs. Lambert's evidence, relating to alleged negotiations between petitioner and the Republic Aviation Corporation as to purchase of the land (R. 73–80, 86–88) and to the alleged lease of the lands by the Government to that company (R. 81–86, 89–96), was excluded by the court. It held for the Government, reserving decision on petitioner's motion to set the ruling aside (R. 99). By an opinion of

January 14, 1942, this motion was denied (R. 102–115), findings of fact and conclusions of law were filed (R. 118–123) and, on January 20, 1942, judgment of condemnation was entered (R. 123–130).

On January 27, 1942, an appeal was taken from the judgment of condemnation and from the various orders already mentioned (R. 158–159). The Government contended that the appeal, taken before the determination of just compensation, was premature and should be dismissed. The circuit court of appeals, however, affirmed. It held (1) that the judgment of condemnation was final and appealable (R. 188–194);[1] (2) that the Secretary of War's determination that this land was necessary for national-defense purposes was not open to judicial inquiry (R. 195); and (3) that a condemnee is not entitled to a jury trial and, in any event, the denial of a jury trial on the question of public use was harmless (R. 195–196).

DISCUSSION

Before discussing the contentions made by petitioner we wish to call to the attention of the Court a preliminary jurisdictional question which we believe the court below decided incorrectly. Instead of dismissing the appeal for want of jurisdiction

[1] Subsequent to the judgment of condemnation, an order was entered directing that compensation be determined by the court rather than by commissioners (R. 161–172). Appeal was dismissed from this order on the ground that it was not final (R. 195). No question is presented here as to this dismissal.

because the judgment was not final under section 128 of the Judicial Code, 28 U. S. C., sec. 225 (a), the circuit court of appeals affirmed the judgment of the district court. In this respect its decision probably conflicts with decisions of this Court and of another circuit court of appeals.

In *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341, this Court held that a condemnation proceeding is not reviewable "until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments." The same rule was applied in *Southern R'y Co.* v. *Postal Telegraph Co.*, 179 U. S. 641, 643, and *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 256; *Wick* v. *Superior Court*, 278 U. S. 575. See also *United States* v. *Beatty*, 232 U. S. 463. In *Dieckmann* v. *United States*, 88 F. (2d) 902 (C. C. A. 7), an appeal from an order overruling objections to the Government's condemnation petition and appointing appraisers was dismissed, the court holding that although such an order was appealable in the state courts,[2] it was not a final order within the provisions of section 128 of the Judicial Code.

The court below declined to follow the decisions of this Court on the ground that unlike the cases cited above the judgment here involved determined that the United States had title and was entitled

[2] By the Act of August 1, 1888, c. 728, sec. 2, 35 Stat. 357, 40 U. S. C. sec. 258, the procedure in federal condemnation proceedings generally follows the state law.

to possession. This distinction is without substance, for in the *Luxton* case this Court held that all rights "whether of title or of damages" must be determined before an appeal will lie. Petitioner sought to raise in the court below the issue as to authority of the United States to condemn her land. Both this Court and the Circuit Court of Appeals for the Seventh Circuit have held that a landowner may not appeal from orders overruling such contentions until after the award of compensation has been made. *Luxton* v. *North River Bridge Co., supra; Southern R'y Co.* v. *Postal Telegraph Co., supra; Dieckmann* v. *United States, supra.* And the judgment of condemnation here is indistinguishable in substance from the order being appealed in the *Grays Harbor* and *Wick* cases.

The question is important in the conduct of federal condemnation proceedings. The court below recognized (R. 189) that as a result of its decision, unless a landowner takes an immediate appeal, he will be foreclosed from raising issues as to authority to condemn when the final judgment determining compensation has been entered. Doubt is, therefore, thrown upon the proper method of procedure to be followed under the Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a. That Act provides that title passes to the Government upon the filing of the declaration of taking. An *ex parte* order is then customarily entered on the declaration of taking determining that the declaration had

conformed to the Act and granting the Government the right to possession. In *Oakland* v. *United States,* 124 F. (2d) 959 (C. C. A. 9), certiorari denied, 316 U. S. 679, the court sustained such an order, holding that questions as to authority of the Government to condemn had not yet been determined. The circuit court of appeals in the instant case took the same view of the judgment which had been entered on the declaration of taking (R. 194). Nevertheless, the logic of its decision would compel the conclusion that such order was final and appealable, because it is this "judgment" which confirms title and possession in the United States. Such was the position taken by the Circuit Court of Appeals for the First Circuit in *Puerto Rico Railway Light & Power Company* v. *United States,* No. 3801, decided November 27, 1942.[3] In that case the court in reliance upon the decision in the instant case held that a judgment on a declaration of taking, which had been entered after hearing, was final and appealable.

In view of the widespread use of the Declaration of Taking Act in the acquisition of property for war purposes, it is submitted that the question of appealability of orders thereon is of general importance which should be authoritatively determined.[4]

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[3] Mimeographed copies of the opinion are filed herewith for the convenience of the Court.

[4] In the twelve months following Pearl Harbor, the United States filed approximately 1,500 declarations of taking to

1. Petitioner's claim that this land is not being taken for public use raises two questions: Whether Congress has authorized the condemnation here involved and, if so, whether Congress can constitutionally do so.[5] The Act of July 2, 1940 (subsection (b), *supra*, p. 3) specifically authorizes the Secretary of War to utilize commercial manufacturers in the procurement of military equipment, including the acquisition of necessary lands, and empowers him to lease, sell, or otherwise dispose of buildings and lands for such manufacture. Accordingly, there can be little question that Congress has authorized the present condemnation. We submit also that this authorization was within the constitutional power of Congress.[6]

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acquire some 13,000 tracts of land, for which $75,000,000.00 was deposited in court. In more than 90% of these cases *ex parte* judgments were entered declaring title and possession to be in the United States. If each of these "orders" or "judgments" is appealable, it will result in needless congestion in the appellate courts (cf. R. 188).

[5] As petitioner admits (Br. p. 9), if the object of the taking here is a legitimate public use, inquiries as to its necessity under the circumstances are for the legislative and executive branches of the Government, not the judicial. Cf. *Boom Company* v. *Patterson*, 98 U. S. 403, 406; *Shoemaker* v. *United States*, 147 U. S. 282, 298; *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66; *Oakland* v. *United States*, 124 F. (2d) 959, 964 (C. C. A. 9), certiorari denied, 316 U. S. 679.

[6] No argument is required to show that the exigencies of national defense in 1940 compelled the Government to aid and encourage by every possible means, if not itself to en-

However, we agree with petitioner that the extent of the authority to acquire lands for use by private manufacturers in the production of war material is a question of general importance which should be determined by this Court, in view of the present widespread use of such facilities. Not only has the authority of the 1940 Act been extended until six months after the termination of the war by section 13 of the Act of June 5, 1942, c. 340, Pub. No. 580, 77th Cong., 2d sess., but similar authority has been granted to the Secretary of the Navy (Act of July 29, 1941, c. 328, 55 Stat. 608). And by section 201 of the second War Powers Act of March 27, 1942, c. 199, Pub. No. 507, 77th Cong., 2d sess., such power has been extended to other Government agencies. It is evident that the issue here presented will frequently recur until the matter has been determined by this Court. Accordingly, the Government does not oppose the

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gage in, the production of airplanes. Whether the production of airplanes in Government operated plants would meet the needs of the time is not here the question. Cf. *United States* v. *Bethlehem Steel Corp.*, 315 U. S. 289. There can be no doubt that the encouragement of airplane production by private manufacturers was a legitimate objective of the national Government. The condemnation of the lands in question, therefore, even for the use of privately owned airplane factories was not only not an invalid taking (*Brown* v. *United States*, 263 U. S. 78, 81–82), but was wholly appropriate to accomplish a legitimate purpose. *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 681; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529–530; cf. *Highland* v. *Russell Car Co.*, 279 U. S. 253, 260.

issuance of a writ of certiorari to review this question.[7]

2. Petitioner also seeks to review the holding of the court below that the Seventh Amendment to the Constitution does not require the use of a jury in federal condemnation proceedings. Since no issues of fact have yet been raised—public use and statutory authority being questions of law—petitioner's rights under the Seventh Amendment are not here involved, for as the court below remarked (R. 196) "There is no constitutional right to have twelve men sit idle and functionless in a jury box."

In any event, the court below was clearly correct in holding that a jury trial is not required in condemnation proceedings. Cf. *Bauman* v. *Ross,* 167 U. S. 548; *Kohl* v. *United States,* 91 U. S. 367; *Crane* v. *Hahlo,* 258 U. S. 142, 147. Simply because a condemnation proceeding is a "suit at law" within the meaning of an Act giving circuit courts jurisdiction of suits at law, *Kohl* v. *United States,* 91 U. S. 367, it does not follow that a right to a jury trial is guaranteed by the Seventh Amendment. In fact, jury trials have been frequently dispensed with in federal condemnation proceedings, either pursuant to specific statutory proce-

[7] If the Government's authority to condemn is sustained, there will be no occasion to determine whether the courts below erred in denying petitioner's request for a bill of particulars on matters which constitute no defense (see Br. 11–12).

dures prescribed by Congress [8] or by conformance with state practice providing for appraisal by commissioners or by the court. See *Crane* v. *Hahlo,* 258 U. S. 142, 147. Many decisions have sustained this practice. *United States* v. *Meyer,* 113 F. (2d) 387, 393 (C. C. A. 7), certiorari denied, 311 U. S. 706, and the cases there cited; see Blair, *Federal Condemnation Proceedings and the Seventh Amendment* (1927), 41 Harv. L. R. 29. Petitioner asserts (Br. 5) that the decision below is in conflict with *Beatty* v. *United States,* 203 Fed. 620 (C. C. A. 4), appeal dismissed and certiorari denied for lack of finality, 232 U. S. 463.[9] But the vitality of the *Beatty* case has been virtually destroyed (as the Eighth Circuit Court of Appeals noted in *United States* v. *Hess,* 71 F. (2d) 78, 80 (C. C. A. 8)) by

> the declaration of the Supreme Court made in the case of *Crane* v. *Hahlo* * * *, more than eight years after the decision in the *Beatty* Case, * * *

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[8] Act of May 18, 1933, c. 32, sec. 25, 48 Stat. 70, 16 U. S. C. sec. 831x; Act of May 15, 1928, c. 569, sec. 4, 45 Stat. 536, 33 U. S. C. sec. 702d.

[9] The value of petitioner's land has not yet been determined. Hence, the holding in the *Beatty* case that such determination must be made by a jury is not relevant. And, in fact, petitioner has heretofore urged in this case that compensation should be determined by commissioners pursuant to New York practice (R. 195).

See, also, Brief for the United States in Opposition in *United States* v. *Kenesaw Mountain Battlefield Ass'n*, 99 F. (2d) 830 (C. C. A. 5), certiorari denied, 306 U. S. 646, where the *Beatty* case was unsuccessfully relied upon to establish a conflict between circuits. Hence, the denial of petitioner's motion for a jury trial does not merit review by certiorari.

CONCLUSION

The Government accordingly suggests that certiorari, limited to the questions of the finality of the judgment of the district court and the authority of the United States to condemn petitioner's lands, be granted.

Respectfully,

CHARLES FAHY,
Solicitor General.
NORMAN M. LITTELL,
Assistant Attorney General,
VERNON L. WILKINSON,
ROGER P. MARQUIS,
Attorneys.

DECEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

No. 5722

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT
October Term, 1942

No. 3801.

PUERTO RICO RAILWAY LIGHT & POWER COMPANY,
Defendant, Appellant,

v.

UNITED STATES OF AMERICA,
Petitioner, Appellee.

Appeal from the District Court of the United States for Puerto Rico

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Before Magruder, Mahoney and Woodbury, JJ.

Henri Brown,
John J. Burns,
for Appellant.

Norman M. Littell,
Assistant Attorney General,
Vernon L. Wilkinson,
John P. Hearne,
Attorneys, Dep't of Justice,
Philip F. Herrick,
United States Attorney,
for Appellee.

OPINION OF THE COURT

November 27, 1942.

Magruder, J. We are obliged in this case to set aside a judgment entered July 10, 1942 by the District Court of the United States for Puerto Rico in a condemnation proceeding, adjudging and decreeing that title to the properties of the Puerto Rico Railway Light & Power Company is vested in the United States and authorizing the United States to enter upon and take possession of the premises on and after July 20, 1942.

The original petition for condemnation was filed on June 29, 1942 by the United States Attorney at the direction of the Attorney General, pursuant to the request of the Federal Works Administrator under the provisions of the amended Lanham Act, 55 Stat. 361, 1/ Accompanying the petition were

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1/ The Act of June 28, 1941, 55 Stat. 361, amended the Act of October 14, 1940, 54 Stat. 1125, by inserting after sec. 3 thereof the following:

"Title II

"Defense Public Works

"Sec. 201. It is hereby declared to be the policy of this title to provide means by which public works may be acquired, maintained, and operated in the areas described in section 202. As used in this title, the term 'public works' means any facility necessary for carrying on community life substantially expanded by the national-defense program, but the activities authorized under this title shall be devoted primarily to schools, waterworks, sewers, sewage, garbage and refuse disposal facilities, public sanitary facilities, works for the treatment and purification of water, hospitals and other places for the care of the sick, recreational facilities, and streets and access roads.

"Sec. 202. Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator is authorized, with the approval of the President, in order to relieve such shortage—

"(a) To acquire . . . improved or unimproved lands or interests in lands by purchase, donation, exchange, lease . . . or condemnation (including proceedings under the Acts of August 1, 1888 (25 Stat. 357), March 1, 1929 (45 Stat. 1415), and February 26, 1931 (46 Stat. 1421)), for such public works.

"(b) By contract or otherwise . . . to plan, design, construct, remodel, extend, repair, or lease public works, and to demolish structures, buildings, and improvements, on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available (transfers of which for this purpose by the Federal agency having jurisdiction thereof are hereby authorized notwithstanding any other provisions of law), provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, and machinery, and do all things in connection therewith to carry out the purposes of this title.

a lengthy Declaration of Taking describing the various properties to be taken, a Motion for Judgment on Declaration of Taking and an Order to Surrender Possession, and a deposit by the United States of $6,250,000, the estimated amount of compensation due—all in accordance with the condemnation procedure authorized by the Act of February 26, 1931, 46 Stat. 1421. On the same day that the petition was filed, the court below entered an ex parte judgment vesting title in the United States and ordering immediate surrender of possession. This judgment was shortly thereafter vacated upon motion by defendant. The United States filed an amended petition for condemnation, by leave of court, and renewed its motion for judgment on the Declaration of Taking. Defendant demurred to the amended petition, asserting its insufficiency on various legal grounds. After hearing and argument, the court in an opinion rejected the contentions of the defendant, and on July 10, 1942 entered the judgment now appealed from.

1/ continued

"(c) To make loans or grants, or both, to public and private agencies for public works and equipment therefor, and to make contributions to public or private agencies for the maintenance and operation of public works, upon such terms and in such amounts as the Administrator may consider to be in the public interest. As used in this paragraph, the term 'private agency' means any private agency no part of the net earnings of which inures to the benefit of any private shareholder or individual.

"Sec. 203. (a) In carrying out this title—

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"(2) wherever practicable, utilization shall be made of existing private and public facilities or such facilities shall be extended, enlarged, or equipped in lieu of constructing new facilities;

"(3) public works shall be maintained and operated by officers and employees of the United States only if and to the extent that local public and private agencies are, in the opinion of the Administrator, unable or unwilling to maintain or operate such public works adequately with their own personnel and under loans or grants authorized by this title; . . .

"Sec. 204. The sum of $150,000,000, to remain available until expended, is hereby authorized to be appropriated to carry out the purposes of this title and for administrative expenses in connection therewith, including personal services and rent in the District of Columbia and elsewhere, printing and binding, and purchase, repair, operation, and maintenance of motor-propelled passenger-carrying vehicles."

At the outset the United States challenges our jurisdiction to entertain the appeal, on the ground that the judgment is not a "final decision" within the meaning of s 128 of the Judicial Code, 28 U.S.C. § 225. It is said that the judgment merely determined the Government's right to condemn, leaving damages for the taking yet to be assessed, and that it is therefore not a final and appealable judgment. This contention has been squarely rejected by the Second Circuit in a careful opinion reviewing all the authorities. United States v. 243.22 Acres of Land, 129 F. (2d) 678 (1942). We agree with this decision. See also City of Oakland v. United States, 124 F. (2d) 959 (C.C.A. 9th, 1942), cert. denied, 316 U.S. 679 (1942). A lengthy opinion by us on the point would therefore be superfluous. The judgment now in question is a "final decision", for purposes of appealability, within the principle of the following decisions of the Supreme Court: Forgay v. Conrad, 6 How. 201, 204 (1848); Thomson v. Dean, 7 Wall. 342, 345 (1868); Ex parte Farmers' Loan & Trust Co., 129 U.S. 206, 213-5 (1889); Knox National Farm Loan Assn. v. Phillips, 300 U.S. 194, 197-8 (1937). Luxton v. North River Bridge Co., 147 U.S. 337 (1893), relied on by the United States, is adequately distinguished in United States v. 243.22 Acres of Land, supra, at p. 682. We said in Rubert Hermanos, Inc. v. People of Puerto Rico, 118 F. (2d) 752, 575 (1941): "A 'final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination."2/ Under the earlier act of August 1, 1888, 25 Stat. 357, 40 U.S.C. §§ 257, 258, establishing the procedure for the judicial condemnation of land, there could be no judgment affecting title or possession until after the damages had been determined. It was the particular purpose of the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. § 258(a)-258(e), to sever the taking of title and possession from controversies as to valuation, and to provide a procedure whereby the United States might be speedily and conclusively vested with title and possession, with authority to demolish existing structures on the condemned land, leaving the issue as to the amount

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2/ On certiorari, the Supreme Court made no comment on the jurisdictional issue we had decided, but reversed our decision on the merits. Puerto Rico v. Rubert Hermanos, Inc., 315 U.S. 637 (1942). The judgment in the case at bar is even more clearly a "final decision" than was the judgment appealed from in the Rubert Hermanos case.

of compensation to be determined in subsequent proceedings.3/ The judgment on the declaration of taking, having this final and immediate effect on property rights, obviously should be reviewable at once, without the necessity of awaiting the outcome of long drawn out controversies as to valuation. Therefore, on reason as well as on authority, we hold that the judgment in question is a "final decision" within the meaning of § 128 of the Judicial Code.

We pass, then, to a consideration of the merits.

The amended Lanham Act declares it to be the policy of the act to provide means by which "public works" may be acquired, maintained, and operated in areas or localities found by the President to be suffering an acute shortage of public works or equipment for public works necessary to the health, safety or welfare of persons engaged in national-defense activities. We think that facilities for the generation and transmission of electricity for purposes of light and power may be comprehended within the term "public work", defined in § 201 as meaning "any facility necessary for carrying on community life substantially expanded by the national-defense program." Various alternative methods are provided for remedying the acute shortage of public works or equipment for public works which the President may find to exist in any area or locality. Under § 202(a) the Federal Works Administrator is authorized "with the approval of the President" to acquire improved or unimproved lands or interests therein by purchase, donation, exchange, lease, or condemnation, for such public works. In § 202(b) the Administrator is authorized, with the approval of the President, by contract or otherwise, to plan, design, construct, remodel, extend, repair or lease public works, and to demolish structures and improvements on lands acquired by condemnation under subsection (a), to provide proper approaches thereto, also utilities, and transportation facilities, and to procure necessary materials and equipment in connection therewith. Under § 202(c) the Administrator is authorized, with the approval of the President, to make loans or grants, or both, to public and private agencies for public works and equipment therefor, and to make contributions to such agencies for the maintenance and operation of public works.

Senator Maloney, the chairman of the Senate committee which reported the bill, expressed his concern lest the limited appropriation

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3/ Under the Act of February 26, 1931, it is provided that upon the filing of the declaration of taking and of the deposit in court of the estimated amount of compensation, title "shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto." Title thus vests authmatically, prior to any judgment of the court. At that point there is no judgment upon which an appeal can be taken. But if the United States wishes to get immediate possession it must, as it did here, move for judgment on the declaration of taking, ordering the parties in possession to surrender possession on a designated day. In granting such a motion, the court necessarily has to decide, as it did here, that the taking was duly authorized by law.

would soon be exhausted in attempts to meet the requests of the communities of the nation "unless very great care is exercised." He emphasized the importance of the provision requiring approval by the President. Thus, he said, "The bill provides that it shall be administered by the Federal Works Administrator, although it also requires that whatever he does must be with the approval of the President of the United States, and that nothing may be done except with the President's approval." And again he said: "The bill first provides that the President himself must find a need. He must authorize the work; and thereafter, if we pass the bill in its present form, the Federal Works Administrator and those under him will proceed with the work." 87 Cong. Rec. 5090-91 (1941). See also, a later colloquy at p. 5093.4/ From the text of the act and from the legislative history we are satisfied that the President is required to approve at least in main outline the particular plan, program, or project formulated by the Administrator for the relief of the defined shortage of public works or equipment therefor, before the Administrator is authorized to proceed. It is not enough that the President, after finding the existence of an acute shortage of public works in a given area or locality, should give the Administrator authority, carte blanche, to relieve such shortage by any of the various methods described in § 202 which the Administrator might thereafter deem expedient.

In the amended petition for condemnation it is stated that on June 8, 1942, the President, pursuant to Title II of the amended Lanham Act, found:

"(a) That an acute shortage of public works and equipment therefor, necessary to the health, safety and welfare of persons engaged in national defense activities, existed or impended, which would impede national defense activities, in and about the area or locality of Puerto Rico, with reference to electrical transmission and distribution facilities and properties and facilities incidental thereto;

"(b) That such public works and equipment therefor could not otherwise be provided when needed, or could not be provided without imposition of an increased excessive tax burden and an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage existed."

Further, it is alleged that on the same date, the President, in the same finding above referred to, "approved action by the Federal Works Administrator by any of the methods prescribed by the act /the amended Lanham Act, § 202/ to relieve the shortage to which the finding of the President of the United States related, to wit, a shortage in the electrical transmission and distribution

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4/ In addition, see S. Rep. 403, 77th Cong., 1st. Sess. (1941) p. 3; H. Rep. 489, 77th Cong., 1st Sess. (1941) p. 3.

facilities and other properties and facilities incidental thereto."5/

The foregoing allegations, admitted on demurrer, are insufficient in law, in that they do not allege that the President had given his approval to the particular project determined upon by the Administrator for the relief of the shortage, namely, the condemnation of the properties of the Puerto Rico Railway Light & Power Company extending over thirty-five municipalities in the Island of Puerto Rico. With the emphasis placed by Congress on economy of administration, on avoidance of duplication, on utilization or enlargement of existing facilities wherever practicable, we think that Congress never intended to commit to the Administrator the discretion to embark upon any such expensive program of condemnation as here presented, without specific approval by the President.

Since this defect is one which might be cured upon remand by a further amendment of the petition for condemnation, or by the filing of a new petition, we do not rest our decision on this ground alone, but proceed to consider a more serious objection urged against the judgment below, namely, that the act gives no authority for the condemnation and taking over as a going concern of the properties, real and personal, of a privately owned public utility.

It now becomes necessary to examine more closely what has been taken over here, as confirmed by the judgment under review.

5/ A certified copy of the letter of the President has been filed with the clerk of this court. The letter reads as follows:

"THE WHITE HOUSE
"WASHINGTON June 8, 1942.

"My dear Mr. Administrator:

"Pursuant to Title II of the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended, I hereb find that an acute shortage of public works and equipment therefor, necessary to the health, safety, or welfare of persons engaged in national defense activities, exists or impends, which would impede national defense activities, in and about the following place:

Place	Public Works and Equipment Required	Total Estimated Cost
Puerto Rico	Electrical transmission and distribution facilities and other properties and facilities incidental thereto.	$10,000,000

"I further find that such public works and equipment therefor cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists.

"I hereby approve your taking action by any of the methods prescribed by said Act, as amended, to relieve such shortage.

"Very sincerely yours,
"(Signed) FRANKLIN D. ROOSEVELT

"General Philip B. Fleming
Federal Works Administrator, Washington, D. C."

Schedule A of the Declaration of Taking begins with the following general statement:

"Part 1.

"The lands and interests in lands hereby taken and estates therein.

"The estates taken for such public use are the full and absolute title of the Porto Rico Railway, Light and Power Company in and to all lands, servitudes, easements, and rights-of-way together with all improvements thereon and appurtenances therto including machinery, instruments, implements, rolling stock and automotive equipment in any building and upon any land which tend directly to meet the needs of the business, systems, industry, and works of said company located in the Island of Puerto Rico. The properties in so far as the description thereof is available in the public records are more particularly described as follows: . . ."

Then follows a detailed description of the various parcels of land owned by the company throughout the island; also certain parcels over which the company has easements or rights of way, with transmission lines, equipment and apparatus thereon. Part 1 concludes with this statement: "The sum of money estimated by the acquiring authority to be just compensation for the aforesaid land in this proceeding and hereby taken is $6,250,000." Part 2 of Schedule A begins with the following:

"A general statement of the systems and facilities located on and forming a part of the land, interests in lands and improvements thereon, hereby taken.

"All of the lands, improvements and appurtenances in the Island of Puerto Rico owned by the Porto Rico Railway Light and Power Company, including dams, reservoirs, penstocks, plants, powerhouses, substations, tunnels, canals, buildings, turbines, generators, switchboards, and other electric generating equipment; all transmission lines and distribution system including poles, transformers, insulators, guys, wires, meters and other equipment necessary or incidental to the transmission and distribution of electric power and the contro thereof; all office buildings, storehouses and officers' and employees' dwellings; all telephone lines and equipment necessary or incidental to the transmission of telephone messages; all of the road bed and rolling stock, including tramway cars, rails and ties, wires and equipment, of the tramway system operated in and between San Juan and Santurce; and all easements, rights-of-way and other rights and interests owned or enjoyed by the Porto Rico Railway Light and Power Company in any way related or incidental to the operation of an electric system and tramway system in the Island of Puerto Rico; all of said properties being and consisting of electrical transmission and distribution facilities and other properties and facilities incidental thereto."

Thereafter follows a detailed description of the "electric system", stated to consist primarily of three hydroelectric power plants, and one steam plant, including dams, reservoirs, powerhouses, generating equipment, buildings, materials and supplies, together with all lands, easements and rights of way acquired for use in connection therewith, all transmission lines of the company's system, all its distribution lines and systems consisting of poles, wires, distribution transformers, service lines, service connections, meters and similar equipment, and all secondary distribution lines. The "tramway system" is then described as consisting primarily of "an electric railway passenger transportation system" operating over a described route and "All the rails, ties, tracks, improvements, terminals, structures, repair shops, rolling stock, feeders, transmission poles and distribution lines, brackets, rotary converters, switchboards and transformers, together with all lands, easements, rights-of-way and other interests in land, used therefor or acquired for use in connection therewith." Part 2 of Schedule A then concludes with the following:

"The above description of the electric and tramway system is intended to cover and include all of the lands, easements, rights-of-way and other interests in lands, properties, systems, plants and equipment of the Porto Rico Railway Light and Power Company in Puerto Rico."

A supplement to the description of the properties taken, containing additions and corrections to Schedule A of the Declaration of Taking, was filed July 6, 1942. This supplement recited:

"That on June 29, 1942, a declaration of taking and petition for condemnation were filed herein taking and condemning, among others, all of the properties of the Porto Rico Railway Light and Power Company in Puerto Rico."

It further recited that this supplement, together with the original declaration of taking, "constitutes a full and complete description of all of the properties of the Porto Rico Railway Light & Power Company in Puerto Rico, sufficient for an identification thereof."

The judgment of the District Court does not set out in detail the property to be taken but incorporates by reference the declaration of taking as supplemented. It adjudges and decrees that:

"The title to the property of the Puerto Rico Railway, Light & Power Company described in Schedule A [illegible] supplemented, which is attached to the amended petition and made a part thereof, is vested in the United States of America."

From the foregoing it seems clear that all the properties of appellant, real and personal, have been taken over as a going concern. We are informed that pursuant to the judgment the United States has taken possession of these properties in their entirety and has turned the same over to the Puerto Rico Water Resources Authority to operate.

We have difficulty in stating any coherent theory of the Government's case. The President's finding is that there is an acute shortage of electrical transmission and distribution facilities and other properties and facilities incidental thereto. There is no finding of a shortage of electric generating facilities; yet the generating plants are taken over. There is no finding of a shortage of transportation facilities; yet appellant's tramway system is taken over. It is not clear just how a condemnation of the power plants and of the tramway system is supposed to relieve a shortage of electrical transmission and distribution facilities. It was suggested by counsel for the Government, at the argument before us, that while the island of Puerto Rico as a whole may not need additional electrical distribution facilities, the Puerto Rico Water Resources Authority, which now furnishes electric power to about one half of the island, has insufficient distribution facilities to serve the whole island; that this is the shortage of public works which the President found to exist. At the hearing the Government submitted the following unsworn statement, which the District Court quoted in full in its opinion:

"In support of the Government's motion for immediate possession of the properties of the Puerto Rico Railway, Light and Power Company the following facts and considerations are brought to the attention of the Court:

"On the Island of Puerto Rico there were at the time of the taking in these proceedings three major separate electric utility systems belonging, respectively, to the Puerto Rico Railway, Light and Power Company, the Mayaguez Light, Power and Ice Company and the Puerto Rico Water Resources Authority. The first two are for the most part powered by fuel oil and the last for the most part by water. The Petroleum Coordinator of the United States brought to the attention of the Federal Works Administrator the fact that there was a shortage of tankers necessary to transport fuel oil to Puerto Rico and that this fact would surely interfere with the generation of electric energy by steam which is of course dependent upon fuel oil. He officially requested the Federal Works Administrator to take suitable measures under the Act here involved (The Lanham Act) to remedy the situation. The Federal Works Administrator is Brigadier General Philip B. Fleming, a distinguished member of the Corps of Engineers of the United States Army. After personally considering the matter with all relevant data he concluded that the solution was the complete integration of all three electric systems so as to use the maximum of hydroelectric power throughout the Island and a minimum of steam power and thus conserve the use of fuel oil. In his judgment these arrangements will assure the furnishing of electric power during the war to all the vital military and naval establishments of the Island. These considerations were presented by the Federal Works Administrator to the President who upon consideration of them made the necessary findings and judgment required by the Act of Congress and approved the taking of any steps authorized by this Act to remedy the situation.

"These are the facts:

"The necessity for expeditious possession of these properties is as great as is the necessity for conserving fuel oil on this Island, lessening the need for ships and freeing them for other uses in the Theatre of War."

Commenting on this, the District Court stated that it would take judicial notice of the fact that there is a necessity to conserve fuel oil. But the President has not found that there is a shortage of electricity due to insufficient capacity of the hydroelectric generating plants on the island. From the record it appears that appellant's system is interconnected with that of the Puerto Rico Water Resources Authority, and thus is in a position to obtain additional power from that source if a shortage of fuel oil should necessitate a curtailment of output from appellant's steam generating plant. Furthermore, the above quoted statement submitted to the District Court, with every indulgence in its favor, hardly explains the condemnation of appellant's three hydroelectric power plants and its tramway system.

Apparently the Government contended in the court below that the Lanham Act not only authorizes the condemnation of land, either improved or unimproved, but also authorizes the acquisition by condemnation of "public works" as defined in the act. Appellant argues that the issue of public versus private power has been a touchy one in Congress for many years, and that legislation intended to authorize the seizure by eminent domain of the properties of privately owned utilities, lock, stock and barrel, would never have been enacted without a bitter fight; yet the committee reports and the discussions on the floor contain no reference to any such far-reaching authorization. However this may be, we do not have to look beyond the text of the statute. The only power of condemnation is that stated in sec. 202 (), and that has reference only to "improved or unimproved lands or interests in lands." The District Court seemed to be of the view that this power of condemnation is somehow enlarged by emanation from sec. 201, which declares it to be the policy of the act to provide means by which public works may be acquired, maintained and operated. But after making this statement of policy the act proceeds in sec. 202 to specify the various methods by which public works may be acquired. One of these methods is the acquisition by purchase, donation, exchange, lease or condemnation, of improved or unimproved lands; under sec 202(b) the United States might construct public works upon land so acquired. Significantly, sec 202(b) includes authority to "lease public works" but not to condemn existing public works. Also, this subsection gives authority to procure necessary materials, supplies, articles, equipment and machinery "by contract or otherwise"; but this cannot be read as authorizing the condemnation of such items of personal property. Section 202(c) provides another method by which needed public works may be supplied for the carrying on of community life, namely, by making loans or grants to public or private agencies. In view of the various methods specifically described in sec. 202 for relieving a shortage of public works, it cannot be implied from the declaration of policy in sec. 201 that authority is given to acquire by eminent domain all the properties of an existing privately owned utility. Furthermore, the only statutory basis under which title and possession could be immediately vested in the United States pursuant to the declaration of taking, in advance of a judicial determination of the amount of compensation is the Act of February 26, 1931, 46 Stat. 1421, which relates only only to condemnation proceedings instituted by the United States "for the acquisition of any land or easement or right of way in land for the public use."

If we understand correctly the position taken by the Government on appeal, it does not now contend that anything can be taken by eminent domain under the amended Lanham Act other than "improved or unimproved lands

or interests in lands" as provided in sec. 202(a). But it is argued, somewhat weakly, that this power, in its application to Puerto Rico, includes the taking not only of "fixtures" on the land as defined by the common law, but also machinery and implements which would be regarded by the common law as personal property but which are classified as immovables by destination under the civil law followed in Puerto Rico. We set out in the footnote a portion of sec. 263 of the Civil Code of Puerto Rico (1930), cited by the Government in this connection.6/

This argument, which appears to be of the afterthought variety, will not bear the weight of the judgment below. We think it altogether unlikely that Congress intended the power of condemnation given in sec. 202 (a), applicable generally throughout the United States and its territories, to have a peculiar, enlarged meaning as applied to Puerto Rico, and perhaps Louisiana, where civil law concepts prevail. But passing that, on the face of sec. 263 of the Civil Code, immovables by destination are not regarded as land or interests in land; rather, the generic term is "immovables". Lands are described as one species of immovables. Another species is immovables by destination, described in the Code as "Machinery, vessels, instruments or implements intended by the owner of the tenement for the industry or works that he may carry on in any building or upon any land and which tend directly to meet the needs of the said industry or works." Furthermore, a large part of the personal property described in the declaration of taking does not even constitute immovables by destination under the doctrine of the civil law, which relates only to machinery, implements, etc. placed by the owner upon his own land to meet the needs of the business or industry which he conducts thereon. Transmission and distribution lines of appellant located on public highways and across lands over which appellant has merely an easement or right of way, do not become immobilized. The same is true of the rolling stock and equipment of the tramway system. See State v. Mexican Gulf Ry. Co., 3 Rob. (La.) 513, 518 (1843).

As above indicated, the avowed purpose of the Government was to take over by eminent domain appellant's whole electric power and tramway systems, and to effect a complete integration of the same with the properties of the Puerto Rico Water Resources Authority, a public corporation created by Act 83 (1941) Laws P.R., p. 684. This program apparently has been an objective of the insular legislature for some years. See Act 94

6/ "Section 262.--Things may be immovable either by their own nature or by their destination or the thing object to which they are applicable.

"Section 263.--The following are immovables:

"1. Lands, buildings, roads and structures of every kind adherent to the soil.

"2. Trees, plants and ungathered fruits, while they are not separated from the land or form an integral part of an immovable.

"3. Everything attached to an immovable in a fixed manner, in such a way that it cannot be separated from it without breaking the matter, or causing injury to the object.

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(1938) Laws P.R., p. 211; Act 148 (1939) Laws P.R., p. 714; Act 111 (1941) Laws P.R., p. 790. Since the amended Lanham Act authorizes only the condemnation of improved or unimproved lands or interests in lands, the purpose of the taking here necessarily fails. The judgment below will have to be set aside in its entirety, for two reasons: first, because it does not sufficiently appear that the President approved the taking; and second, because if we should affirm the judgment insofar as it applies to the taking of lands and interests therein owned by appellant, that would leave the United States irrevocably committed under the Act of February 26, 1931, 46 Stat. 1421, to the payment of compensation for something which the Federal Works Administrator might never have dreamed of taking had he correctly apprehended the limited scope of his powers under the act. Taking appellant's lands and easements would quite effectively dismember a going concern, but it is not obvious that this would contribute to the relief of a shortage in electrical transmission and distribution facilities. Appellant will have to be restored forthwith to full possession of all its properties.

The judgment of the District Court is vacated and the case is remanded to that court for further proceedings not inconsistent with this opinion.

6/ continued

"5. Machinery, vessels, instruments or implements intended by the owner of the tenement for the industry or works that he may carry on in any building or upon any land and which tend directly to meet the needs of the said industry or works."

* * * * *